Public Prosecutor v Mansur bin Yahya & Anor

HIGH COURT (PULAU PINANG) — CRIMINAL APPLICATION NO 42A–1 OF 2003
KAMALANATHAN RATNAM J
20 FEBRUARY 2004

Evidence — Conflicting testimony — Witnesses contradicted on material points — SP5 stated second accused emerged from room — SP4 testified second accused seated in room — Whether a material clash existed

Both accused were charged with two charges of corruption under s (4)(a) of the Anti Corruption Act 1961 read together with s 34 of the Penal Code. After hearing the evidence of the prosecution, the sessions court acquited and discharged both accused of both charges without their defence being called. The prosecution's appeal to the High Court was dismissed. The prosecution appealed again. At the present appeal, the court found that the prosecution led no evidence against the first accused. The evidence given by the prosecution's witnesses, SP4 and SP11 against the second accused conflicted with the evidence of two other witnesses for the prosecution, SP5 and SP9. SP5 stated that when the second accused was emerging from the room there were marked notes scattered, but SP4 stated that both accused were seated in the room at the material time.

Held, dismissing the appeals:

(1) Where there is a conflict of evidence in the prosecution's case itself, and in this case a very material conflict, the benefit of the doubt must be given to the accused. There was no evidence against the first accused. The court dismissed the prosecution's appeal against the first accused (see para 11).

(2) As for the second accused, under cross-examination SP5 and SP9 admitted reading their investigation diaries before testifying. In the light of the conflicting evidence of the prosecution about the second accused the court dismissed the appeal against the second accused's acquittal (see paras 13 and 14).

[Bahasa Malaysia summary

Tertuduh-tertuduh telah dituduh dengan dua tuduhan mengambil rasuah di bawah s (4)(a) Akta Pencegah Rasuah 1961 dibaca bersama dengan s 34 Kanun Keseksaan. Setelah mendengar bukti yang dikemukakan oleh pihak pendakwaan, mahkamah sesyen membebaskan dan melepaskan tertuduh-tertuduh daripada kedua-dua tuduhan tanpa pembelaan dipanggil. Pihak pendakwaan merayu terhadap keputusan itu di Mahkamah Tinggi tetapi rayuan tersebut ditolak. Pihak pendakwaan kini merayu semula. Dalam rayuan ini, pihak pendakwaan tidak mengemukakan sebarang bukti terhadap tertuduh pertama. Keterangan yang dikemukakan oleh saksi-saksi pendakwaan, SP4 dan SP11 terhadap tertuduh kedua jelas bercanggah dengan keterangan yang dikemukakan oleh dua saksi pendakwaan yang lain iaitu SP5 dan SP9. SP5 berkata bahawa semasa tertuduh kedua muncul daripada bilik itu terdapat wang yang ditandakan berselerak, tetapi SP4 berkata bahawa kedua-dua tertuduh sedang duduk di dalam bilik itu pada masa itu.

Diputuskan, menolak rayuan-rayuan itu:

(1) Di mana terdapat percanggahan keterangan di dalam kes pendakwaan, dan di dalam kes ini percanggahan yang material, faedah kesangsian mesti diberi kepada tertuduh. Tiada keterangan terhadap tertuduh pertama. Mahkamah menolak rayuan pendakwaan terhadap tertuduh pertama (lihat perenggan 11).

(2) Mengenai tertuduh kedua, semasa disoal balas SP5 dan SP9 mengaku membaca diari penyiasatan sebelum memberi keterangan. Memandangkan percanggahan keterangan pendakwaan itu mengenai tertuduh kedua mahkamah menolak rayuan terhadap pembebasan tertuduh kedua (lihat perenggan-perenggan 13 dan 14).]

Notes

For cases where witnesses contradicted on material points, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 804.
For witnesses generally, see 12 *Halsbury's Laws of Malaysia*, para [210.137].

Legislation referred to

Anti Corruption Act 1961 s 4 (a)
Penal Code s 34

Zulqarnain bin Hassan (Attorney-General's Chambers) for the prosecution.
M Athimulan (Athimulan & Co) for the first accused.
S Anthonisamy (Aziz Anthony & Co) for the second accused.

Kamalanathan Ratnam J:

The charges

[1] Both the accused, a Corporal and a Lance Corporal are policemen attached to the Pejabat Peronda Lebuhraya. They faced two charges of corruption. The charges read as follows:

First charge:

Bahawa kamu dengan niat bersama pada 25 Ogos 1997, jam lebih kurang 1.15 petang, di Pejabat Peronda Lebuhraya Butterworth-Kulim, Plaza Tol Kubang Semang, didalam daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, sebagai agen Kerajaan Malaysia, iaitu Kpl 73103 dan L/Kpl 92675, iaitu anggota Polis DiRaja Malaysia, bertugas di Unit Peronda Lebuhraya Butterworth-Kulim, telah secara rasuah menerima suatu suapan untuk diri kamu, iaitu, wang tunai berjumlah RM50 dari seorang, iaitu U Thamotharan a/l Uthirapatai, sebagai suatu dorongan untuk tidak melakukan suatu perbuatan berhubung dengan urusan prinsipal kamu, iaitu, untuk tidak menyaman seorang, Ganesan a/l Krishnan yang memandu lori No WEY 3074 kepunyaan U Thamotharan a/l Uthirapatai, yang dikatakan telah melakukan kesalahan lalu lintas iaitu, kain tarpan koyak dan dinding lori lekat pasir, dengan itu kamu telah melakukan satu kesalahan di bawah s 4(a) Akta Pencegah Rasuah 1961 (Undang-Undang Malaysia No 57) dibaca bersama s 34 Kanun Keseksaan.

Second charge:

Bahawa kamu dengan niat bersama pada 25 Ogos 1997, jam lebih kurang 1.15 petang, di Pejabat Peronda Lebuhraya daerah Seberang Perai Tengah, di dalam

Negeri Pulau Pinang, sebagai agen Kerajaan Malaysia, iaitu Kpl 73103 dan L/Kpl 92675, iaitu anggota Polis DiRaja Malaysia, bertugas di Unit Peronda Lebuhraya Butterworth-Kulim, telah secara rasuah menerima suatu suapan untuk diri kamu, sebagai bayaran bulanan, iaitu, wang tunai berjumlah RM250 dari seorang, iaitu U Thamotharan a/l Uthirapatai, sebagai suatu dorongan untuk tidak melakukan suatu perbuatan berhubung dengan urusan prinsipal kamu, iaitu, untuk tidak mengambil tindakan ke atas pemandu 3 (tiga) buah lori kepunyaan U Thamotharan a/l Uthirapatai, yang melalui Lebuhraya Butterworth-Kulim, dengan itu kamu telah melakukan satu kesalahan di bawah s 4(a) Akta Pencegah Rasuah 1961 (Undang-Undang Malaysia No 57) dibaca bersama s 34 Kanun Keseksaan.

Facts

[2] On 13 August 1997, both the accused were on patrol duty along the Butterworth/Kulim Highway. Both the accused detained a lorry driver SP1 along the Highway for an alleged traffic offence. After some discussion, both the accused asked SP1 for the hand phone number of the owner of the said motor lorry. No summons was issued for any breach of any law. SP1 handed them his employer's handphone number.

[3] The next day the first accused telephoned the owner of the lorry ('SP8') and informed him that he wanted to discuss a matter with him. On 21 August 1997 at 1.30pm, the first accused again telephoned SP8 and had a discussion after which SP8 made a report at the Anti Corruption Agency ('BPR') at 3pm on the same day.

[4] The BPR decided to record the conversation between SP8 and the first accused and this was done on 22 August 1997 and a copy of the transcript of the conversation was tendered in court. Subsequently, two other conversations were also recorded. There was nothing incriminating in all the three conversations.

[5] Subsequently on 25 August 1997, SP8 and a BPR Officer ('SP2') went to the accuseds' office. SP8 was given marked notes by the BPR. At the office SP8 handed over the marked notes amounting to RM300 to the second accused and this was witnessed by SP2. There was no evidence however if the money was in an envelope or given as cash. They then came out of the office and gave the pre-arranged signal of wiping the face and combing the hair to the BPR officers who were stationed outside the office.

[6] Immediately thereafter, three BPR Officers namely SP5, SP9 and SP10 rushed into the office. They however found the said RM300 lying scattered in another room.

[7] The above are the undisputed facts.

Findings of the court

[8] After hearing the evidence of the prosecution, the learned sessions judge acquitted and discharged both the accused of both charges without their defence being called. Dissatisfied with the said decision, the public prosecutor appealed. I heard the appeal and also dismissed the same. Dissatisfied with my decision, the public prosecutor has again appealed. These are my reasons for dismissing the appeal.

[9] The evidence against the second accused is to be found in the evidence of SP2, the BPR Officer who accompanied SP8. According to SP2, when SP8 handed over the marked notes, the second accused received them, counted the notes and put them into his right pocket. At that time both the accused were seated at their respective tables. As soon as SP2 and SP8 walked out and gave the signal that the money transaction had been completed three other officers namely SP5, SP9 and SP10 rushed in. SP5's evidence was that as soon as he entered the room, the first accused was seated at his table but the second accused was then emerging from the room where the marked notes were found scattered. SP5 then warned the second accused. This evidence of SP5 was corroborated by the other BPR officer, SP9.

[10] However, the prosecution also called SP4, another policeman who shared the office with both the accused. He testified that when the BPR Officers burst into their common office, there were four of them including the two accused, and that all four were in fact seated at their respective tables. SP11, the other policeman who was in the room confirmed this evidence. Both SP4 and SP11 confirmed that the BPR Officers directed all four of them to remain seated as they were.

[11] This is a case where there is a conflict of evidence in the prosecution's case itself. I do not know why the prosecution decided to call as witnesses SP4 and SP11. But having called them as material witness this court has no reason to reject their evidence which clearly was in conflict with the evidence of SP5 and SP9. Two witnesses say the second accused remained seated at his desk. Two witnesses say that he was coming out of the room where the marked notes were found.

[12] The law in such a situation is clear. Where there is a clash of evidence in the prosecution's case itself, and in this case a very material clash, the benefit of the doubt must be given to the accused. Up to this stage, there was no evidence against the first accused. So I dismissed the appeal of the prosecution against the first accused.

[13] As for the second accused, under cross-examination SP5 and SP9 admitted reading their investigation diaries before testifying.

[14] In the light of the conflicting evidence of the prosecution that the second accused was in fact seen coming out of the room in which the marked notes were found scattered and in the light of the other credible evidence that showed that he had never moved from his seat, I dismissed the appeal against the second accused's acquittal. Further, no evidence was led to show if any finger prints of both accused were found on the marked notes.

Appeals dismissed.

Reported by R Lalitha